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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP1938

NEW RICHMOND NEWS and
STEVEN DZUBAY,

Plaintiffs-Respondents,

v.

CITY OF NEW RICHMOND,

Defendant-Appellant.

ON APPEAL FROM ST. CROIX COUNTY CIRCUIT COURT,
THE HONORABLE HOWARD W. CAMERON, PRESIDING
ST. CROIX COUNTY CASE NO. 13-CV-163

NON-PARTY BRIEF AND SUPPLEMENTAL APPENDIX OF
THE WISCONSIN DEPARTMENT OF JUSTICE

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INTRODUCTION

The Wisconsin Department of Justice submits this non-party brief to provide guidance regarding the interaction between the federal Driver's Privacy Protection Act 18 U.S.C. §§ 2721, et seq. ("DPPA"), and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31-19.37, in the context of public records requests to law enforcement agencies.

As discussed in greater detail below, the Department of Justice continues to endorse the informal opinion it issued on April 29, 2008, addressing this very same issue. *See* I-02-08 (Apr. 29, 2008), <http://www.doj.state.wi.us/ag/informal-opinions>.

After the 2008 Attorney General opinion issued, the Seventh Circuit issued a decision addressing whether the placement of a parking violation citation on the windshield of a vehicle violated the DPPA. *Senne v. Vill. of Palatine, Ill.*, 695 F.3d 597 (7th Cir. 2012) (en banc). In 2013, the U.S. Supreme Court issued a decision addressing whether disclosure of names and addresses sought by trial lawyers to find potential plaintiffs fit one of the DPPA's exceptions. *Maracich v. Spears*, 133 S. Ct. 2191 (2013).

Both of these decisions have caused some confusion in Wisconsin's legal, local government, and law enforcement communities. The Appellants ("City of New Richmond") argue that these two decisions demand a "restrictive approach" that was "not anticipated by the Wisconsin

Attorney General’s earlier contrary opinion on the subject.”
(City of New Richmond Br. 11.)

For the reasons explained below, the Department of Justice disagrees with this restrictive approach and reading of *Senne* and *Maracich*, and therefore continues to endorse the 2008 Attorney General opinion.

**INTEREST OF DEPARTMENT OF JUSTICE FILING
NON-PARTY BRIEF**

The Attorney General is authorized to enforce the public records law. Wis. Stat. § 19.37 (1)(b). The Attorney General also is authorized to give advice to any person about the application of the public records law to any set of circumstances. Wis. Stat. § 19.39. The Wisconsin Supreme Court has recognized that the Attorney General’s opinions and writings have special significance in interpreting public records law. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 41, 341 Wis. 2d 607, 624 N.W.2d 367 (2012) (“The opinions and writings of the Attorney General have special significance in interpreting the Public Records Law, inasmuch as the legislature has specifically authorized the Attorney General to advise any person about the applicability of the Law.”).

The Attorney General’s role as the principal statewide interpreter, and enforcer, of the public records law gives the Department of Justice a unique, legislatively recognized interest that extends beyond the resolution of individual controversies. Many individuals making public records

requests, as well as many public records custodians, are not legally trained. Even ostensibly straightforward provisions of the public records law can prompt inquiries to the Department of Justice, particularly in light of a federal statute that could be misinterpreted as contradicting the state's policy toward open government.

Given that the parties in this case, as well as local governments throughout the state, have questions about the interaction between the DPPA and Wisconsin public records law as it relates to requests for copies of law enforcement records, the Department of Justice has an interest in providing the Attorney General's opinion on this matter.

ARGUMENT

I. The DOJ continues to endorse the 2008 informal Attorney General opinion addressing interaction between Driver's Privacy Protection Act and Public Records Act

On April 29, 2008, former Attorney General J.B. Van Hollen published his informal opinion in response to a request by Mr. Robert J. Dreps and Ms. Jennifer L. Peterson on behalf of their clients, Capital Newspaper Portage, the *Wisconsin State Journal*, *The Capital Times*, *The Janesville Gazette*, the *Milwaukee Journal Sentinel*, and the Wisconsin Freedom of Information Council. I-02-08 (Apr. 29, 2008). Specifically, the request sought the Attorney General's opinion "regarding the interaction between the federal [DPPA] . . . and the Wisconsin Public

Records Law,... in the context of public records requests to law enforcement agencies.” (Amicus Supp. App. 1.)

The following legal principles are listed at the conclusion of the opinion:

- a. If the authority did not obtain the information from a state DMV, the DPPA does not prohibit disclosure. This is true even if it is the same type of information that is confidential in the hands of a state DMV.
- b. If the requested information does not meet the DPPA’s statutory definitions of “personal information” or “highly restricted personal information,” the DPPA does not limit disclosure.
- c. If the information does meet the DPPA’s statutory definition of “personal information” or “highly restricted personal information,” *and* was obtained from a state DMV, the information may be used for a permissible use as specified in 18 U.S.C. § 2721(a)(2) (for highly restricted personal information) or § 2721(b) (for personal information).
- d. A permissible use, pursuant to 18 U.S.C. § 2721(b)(1), for both personal information and highly restricted personal information is “use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.” Responding to public records requests is a required function of law enforcement agencies. Personal information or highly restricted personal information obtained from the state DMV and contained in law enforcement records may be provided in response to a public records request unless the

public records balancing test or statutory prohibitions other than the DPPA preclude disclosure.

- e. Additional DPPA provisions also authorize disclosure of personal information, but not highly restricted personal information, when the following types of records are disclosed in response to public records requests:
- Uniform Traffic Citations;
 - Driving-related warnings;
 - Uniform Traffic Accident Reports, their attachments, and related materials; or
 - Other law enforcement records related to vehicular accidents, driving violations, or driver status.
- f. A law enforcement officer may not obtain and/or disclose personal information from DMV records for a purpose not authorized as a permissible use in 18 U.S.C. § 2721(b).

(Amicus Supp. App. 14-15.)

These well-reasoned legal principles have served the public well over the past nearly seven years since the 2008 Attorney General's opinion was issued. The Department of Justice continues to endorse these legal principles despite the recent federal court decisions.

II. Two recent federal court decisions interpreting sections of the Driver's Privacy Protection Act do not alter the Attorney General's 2008 informal opinion.

City of New Richmond argues that two recent federal court decisions—*Senne* and *Maracich*—alter the Attorney

General's 2008 opinion. Neither *Senne* nor *Maracich* is on point or is controlling. Therefore, the DOJ continues to endorse the 2008 Attorney General opinion.

A. *Maracich v. Spears* is not on point

In *Maracich*, the U.S. Supreme Court opined on two of the exceptions provided by the DPPA. The Court examined whether 18 U.S.C. § 2721(b)(4)¹ or (12)² allowed the DMV to provide personal information of thousands of car buyers, by means of a state law freedom of information act request, to attorneys seeking plaintiffs for a class action lawsuit. *Id.* at 2195. The Court determined that solicitation of prospective clients was not permitted under either the (b)(4) or (b)(12) exception. *Id.* at 2209. However, the Court explicitly stated that it “has not considered whether the respondents’ conduct was permissible under the (b)(1) governmental-function exception.” *Id.* at 2210.

The Attorney General's 2008 opinion that the DPPA permits state DMVs to disclose personal information from driver records to fulfill public records requests was based on

¹“For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.”

²“For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.”

18 U.S.C. § 2721(b)(1). (Amicus Supp. App. 2, 6-12.) The *Maracich* holding was limited to the interpretation of two very specific phrases: “in connection with” litigation, and “investigation in anticipation of litigation,” neither of which is found in § 2721(b)(1). 133 S. Ct. at 2210.

Maracich is wholly inapplicable as to whether fulfilling an open records request under Wisconsin law is permitted by the DPPA’s 18 U.S.C. § 2721(b)(1) government-function exception. The Court left the door open to arguments that state law authorizing the release of information otherwise protected under the DPPA may be permissible under § 2721(b)(1).

Moreover, nothing in *Maracich* changes the Attorney General’s opinion that the definition of “personal information” under 18 U.S.C. § 2725(3) excludes personal information incorporated into an accident report or traffic citation. (See Amicus Supp. App. 12.) Nor does the *Maracich* holding affect the Attorney General’s opinion that the DPPA does not preclude public access to the Uniform Traffic Accident Reports and related records. (Amicus Supp. App. 13.)

For all these reasons, *Maracich* is not on point and does not affect the 2008 Attorney General opinion.

B. *Senne v. Village of Palatine* is not controlling

In *Senne*, the Seventh Circuit concluded a parking ticket with the driver’s personal information placed on the

windshield of the vehicle constituted a disclosure under the DPPA. The holding does not cast doubt on the conclusion reached by the 2008 Attorney General opinion.

Specifically, the court in *Senne* evaluated the dismissal of a complaint asserting the Village of Palatine's practice of printing personal information obtained from motor vehicle records on a parking ticket was a violation of the DPPA. The parking ticket in question was left on the windshield of Mr. Senne's car and listed his full name, address, driver's license number, date of birth, sex, height, and weight. *Id.* at 600.

The court took no issue with the disclosure of the information by the DMV to the village, but rather focused on how the village's police department used that information. *Id.* at 602. The decision turned on whether all of the disclosed information *was used* either by a law enforcement agency in carrying out its function under 18 U.S.C. § 2721(b)(1), or in connection with a civil or administrative proceeding, including service of process under § 2721(b)(4). *Id.* at 608.

Ultimately, the court reversed and remanded the dismissal, holding that the parking ticket was a disclosure under the DPPA, and explaining that, to fall under the 18 U.S.C. § 2721(b)(1) exception, the disclosure of information must "comply with those legitimate uses of information identified in the statutory exceptions." *Id.* at 609.

Like *Maracich*, the Seventh Circuit's decision in *Senne* has no impact on the 2008 Attorney General opinion. The facts of *Senne* have no relation to a public records request under Wisconsin state law. The Seventh Circuit did not address the merits of Mr. Senne's claim. Instead, the court concluded that the parking ticket constituted a disclosure regulated by the DPPA, and remanded the case back to the district court for further proceedings. On remand, the district court again held that the Village of Palatine did not violate the DPPA. *Senne v. Village of Palatine*, 6 F.Supp.3d 786 (N.D. Ill. 2013).

Accordingly, *Senne* is not controlling and does not affect the 2008 Attorney General opinion.

CONCLUSION

For the reasons stated, the Department of Justice argues that neither *Senne* nor *Maracich* alters the 2008 Attorney General opinion.

Dated this 16th day of April, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,882 words.

Dated this 16th day of April, 2015.

ANDREW C. COOK
Deputy Attorney General

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of April, 2015.

ANDREW C. COOK
Deputy Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of April, 2015.

ANDREW C. COOK
Deputy Attorney General

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A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 16th day of April, 2015.

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